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No. 01-1363

Supreme Court, U.S.
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Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, AND AMERICAN MOTORISTS INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, AND LONDON MARKET INSURERS (as the insurers for the liability of James O'Donnell (deceased), Steven Kennedy, John Chantrey (deceased), and Peter Territo),

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Petitioners file this reply brief to respond to three issues raised by Respondents which, as stated by Respondents, mislead this Court. First, as discussed below, the passage of time has not eliminated the impact of the issue before this Court. Because these claims are based on latent diseases that appear decades after the Respondents' employment at the Avondale shipyard and other workplaces, new cases are frequently being filed against Petitioners and similarly situated employee defendants who should enjoy immunity under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(i) [the "Act" or the "LHWCA"].

Second, contrary to Respondents' representations, the issue presented is ripe for review. The evidence at trial established that each of these Respondents, and each of these Petitioners, enjoy the protection of the LHWCA. Furthermore, the issue of whether the Act applied to these workers was never contested by Respondents. Rather, Respondents merely argued that the Louisiana state law overrode the federally-granted immunity.

Finally, the direct conflict among the courts was not brought to this Court's attention in the Petition for Writ of Certiorari in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939 (1989). Moreover, since the denial of certiorari in *Logan*, other jurisdictions — the federal fifth and third circuits — have considered the issue and deepened the split. Thus, this Court's denial of review in *Logan* if anything intensifies the need for review in the case now before the Court.

I. The Passage of Time Has Not Eliminated The Impact Of This Issue.

Because these are latent disease cases, longshore and harbor workers who were exposed to asbestos and other alleged toxins in the 1960s and early 1970s continue to allege recent diagnoses of asbestosis, pleural diseases, and mesothelioma, and continue to sue statutorily immune co-workers such as Petitioners. In the instant case, the Respondents were exposed to asbestos in the 1950s, 1960s, and 1970s, but were not diagnosed with asbestos-related diseases until the early 1990s.

Most importantly, Respondents are fully aware that thousands of these cases against Petitioners and those similarly situated are currently waiting on state court dockets for court dates. Moreover, Respondents also are aware that in this jurisdiction alone, new cases are filed regularly, with similarly situated plaintiffs alleging recent diagnoses of asbestosis and other alleged toxin-related latent diseases against LHWCA-immune co-employees. Thus, the cases now before the Court are not isolated and by no means are the tail-end of the problem.

II. The Question Presented Is Ripe For Review.

Respondents wrongly argue that the preemption issue is not "ripe," based upon the meritless assertion that they are not covered by the LHWCA. This argument is a red herring, and has nothing to do with the doctrine of ripeness. As shown below, Petitioners presented conclusive evidence at trial that Petitioners were covered by the LHWCA–evidence that was not contested by Respondents at that time or thereafter. Moreover, the

opposition offers no legal argument in support of the claim that Respondents are not covered by the LHWCA, and presented no legitimate basis for this Court to conclude that it would be unable to resolve the question presented.

The evidence at trial established that each of the Petitioners and the Respondents are covered by the LHWCA, because each worked at a shipyard situated on the banks of a navigable waterway, the Mississippi River, building or repairing vessels. In fact, Respondents' original petitions stated that each worked at Avondale Shipyards building and repairing vessels.[1] Testimony at trial further established that the shipyard was located on the banks of the Mississippi River. This evidence was before the Court and never disputed. Rather, Respondents simply argued that they could sue the Petitioners despite the LHWCA's grant of immunity.

Based upon these undisputed, if not admitted, facts, Respondents and Petitioners, as a matter of law, have the right to the protections and benefits afforded under the LHWCA. A worker falls under the LHWCA if he meets a "situs" and "status" test. The "situs" requirement of the LHWCA includes workers injured over water as well as those injured on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."[2] Each of the Respondents in this case meet this test, because they worked at Avondale, a facility on the banks of the Mississippi River

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1 *See* Petitioners' Original Brief on Common Issues, p. 13, footnote 52.

2 33 U.S.C. § 903(a) (emphasis added).

that built and repaired ships, as was admitted by their petitions[3] and their trial testimony.

To meet the "status" test, a person must be "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker."[4] Again, the Respondents in this case meet the test because they all were shipbuilders or repairmen.[5] Because Respondents and Petitioners meet the situs and status tests, they fall within the LHWCA's grasp.

III. The Petition for Certiorari in *Logan* Did Not Identify the Conflict Between *Fillinger* and *Poche* on the Issue Presented in this Case.

Respondents' argument that this Petition should be denied because this Court previously denied certiorari in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939 (1989), is likewise unpersuasive; the *Logan* Court was never presented with and never addressed the conflict among the courts on this issue evidenced by the Alabama Supreme Court decision in *Fillinger v. Foster,* 448 So.2d 321 (Ala. 1984), *cert. denied*, 469 U.S. 872 (1984), and the Louisiana Supreme Court decision in *Poche v. Avondale Shipyards, Inc.,* 339 So.2d 1212 (La. 1976). Moreover, denials of petitions for writs of

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[3] *See* Petitions, 00-CA-344, Vol. 1, p. 2; 00-CA-345, Vol. 1., p. 2; 00-CA-346, Vol. 1, p. 2; 00-CA-347, Vol. 1, p. 2; 00-CA-348, Vol. 1, pp. 2, 86-88, 00-CA-349, Vol. 1, pp. 2, 32-36; 00-CA-350, Vol. 1, pp. 2, 32-36; 00-CA-351, Vol. 1, pp. 2, 26; 00-CA-352, Vol. 1, p. 3.

[4] 33 U.S.C. § 902(3) (emphasis added).

[5] *See* footnote 3, *supra*.

certiorari are not substantive decisions. In addition, the split of authority on this issue at that time was not as developed as it is today. Since *Logan*, the federal Third and Fifth Circuits have also considered the issue and concluded that the federal law here should preempt the state law. *Peter v. Hess Oil*, 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 504 U.S. 913 (1993).[6] Thus, this expanded conflict among the courts warrants review in this case.

IV. Conclusion.

In conclusion, the Court should grant this Petition for a Writ of Certiorari to address the conflict and reinstate the federal LHWCA immunity. These Petitioners and others similarly situated continue to be named as defendants in latent disease personal-injury lawsuits brought by co-employees, in defiance of their rights to immunity under the LHWCA. Additionally, Petitioners met their burden of proof at trial, demonstrating by admitted or uncontested facts that as a matter of law Petitioners and Respondents alike are entitled to the rights and benefits granted by the LHWCA. Finally, this Court's denial of the Petition for Writ of Certiorari in *Logan v. Louisiana Dry Dock* should not persuade the Court to deny this Petition, because the issue was not fully presented in that case, and the split in authority at that time was new and immature. As a result, this Court should not be influenced by Respondents' opposition, but should grant the Petition to redress the

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[6] Respondents argue in footnote 3 that the Fifth Circuit's opinion in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, does not address the LHWCA. However, it does address the preemption of state law by federal law in the maritime arena.

disparate application of the LHWCA in different jurisdictions, which has been reaffirmed by the lower court's denial of LHWCA immunity to Petitioners, and to prevent the same result in the thousands of pending cases.

Respectfully submitted,

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